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No. 90-1509

In the Supreme Court of the United States

OCTOBER TERM, 1990

AURELIANO GALINDO VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a canine sniff of a garage from a public alley is a "search" within the meaning of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 909 F.2d 235. The opinion of the district court (Pet. App. 16-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1990. A petition for rehearing was denied on October 26, 1990. Pet. App. 15. On January 18, 1991, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 25, 1991. The petition was filed on March 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing heroin and cocaine with intent to distribute them, in violation of 21 U.S.C. 841(a)(1), and using and carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). He was sentenced to a 300-month prison term for the drug offense and a consecutive 60-month prison term for the firearms offense. The court of appeals affirmed. Pet. App. 1-13.

1. The evidence at trial showed that petitioner stored large quantities of heroin and cocaine, as well as firearms, in a padlocked garage on a grassy lot abutting a public alley in Chicago. On four different days in April and May 1988, members of the Chicago Police Department saw petitioner unlock and enter the garage empty-handed and emerge several minutes later with a partially filled green plastic bag. On each occasion, petitioner got into his car, took the bag to a house or apartment building, and left a short while later without the bag. No other person was seen entering the garage during the period of surveillance. Pet. App. 2.

On May 24, 1988, a confidential informant told one of the officers that the garage contained a large amount of cocaine. At that point, a Drug Enforcement Administration agent brought a trained narcotics detection dog to the public alley abutting the garage. Upon reaching the garage, the dog barked and pawed at the door, indicating the presence of narcotics nearby. Pet. App. 2-3.

The Chicago police, citing the confidential informant's tip and the dog's reaction near the garage, obtained a warrant authorizing a search of the garage. The police found large amounts of narcotics, as well as a loaded handgun and three handguns with unloaded clips, in the passenger compartment and trunk of a car parked in the garage. Pet.

App. 3. Petitioner ultimately was found guilty of possessing 112 kilograms of heroin and 57 kilograms of cocaine with intent to distribute them. *Id.* at 9.

2. Petitioner filed a pretrial suppression motion asserting that the dog sniff was an unlawful search of the garage and that the drugs and guns were fruits of that search. Pet. App. 3. The district court denied the motion. *Id.* at 16-19. The court held that petitioner's argument was foreclosed by this Court's decisions that a "non-intrusive technique, such as a dog sniff, that only discloses the presence or absence of contraband, does not infringe upon any reasonable expectation of privacy." *Id.* at 17-18 (citing *United States* v. *Place*, 462 U.S. 696 (1983); *United States* v. *Jacobsen*, 466 U.S. 109 (1984)). Alternatively, the court held that even if the warrant was rendered invalid by the dog sniff, "the officers were entitled to rely on it in good faith." *Id.* at 18 (citing *United States* v. *Leon*, 468 U.S. 897 (1984)).

3. The court of appeals affirmed. Pet. App. 1-13. In rejecting petitioner's Fourth Amendment claim, the court relied on this Court's opinions in *Place* and *Jacobsen*, as well as its own decisions that "have consistently held that a canine sniff test that is used to detect the presence of contraband is not a fourth amendment search." *Id.* at 5 (citing cases). In light of those decisions, the court concluded that "subjecting the garage to a 'sniff-test' from a public alley was not a warrantless search." *Ibid.* Consequently, the court did not reach the question whether reasonable suspicion is necessary to initiate a dog sniff "that is more intrusive and that exposes private information other than the presence of contraband." *Id.* at 5-6. Nor did the court of appeals consider the district court's alternative holding that the evidence was admissible under the good faith exception to the exclusionary rule. *Id.* at 4.

ARGUMENT

The court of appeals correctly held that a canine sniff that reveals only the presence or absence of narcotics is not a Fourth Amendment search. Although the Second Circuit has analyzed the Fourth Amendment issue differently, the result in this case would be the same even under the Second Circuit's analysis. Accordingly, further review is not warranted.

1. In *United States* v. *Place*, 462 U.S. 696, 707 (1983), this Court concluded that a canine sniff of luggage located in a public place is not a "search" within the meaning of the Fourth Amendment. The Court recognized that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *Ibid.* (citing *United States* v. *Chadwick*, 433 U.S. 1, 7, 13 (1977)). But the Court observed that a canine sniff is "*sui generis*," because it "does not require opening the luggage" and "does not expose noncontraband items that otherwise would remain hidden from public view." 462 U.S. at 707. The Court emphasized that "the sniff discloses only the presence or absence of narcotics, a contraband item." *Ibid.* The Court added that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed." *Ibid.*

In *United States* v. *Jacobsen*, 466 U.S. 109 (1984), the Court held that a chemical field test that "merely discloses whether or not a particular substance is cocaine" is not a search. *Id.* at 123. The Court reasoned that such a test impairs no legitimate privacy interest because Congress has decided "to treat the interest in 'privately' possessing cocaine as illegitimate." *Ibid.* Accordingly, "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy

interest." *Ibid.* That result, the Court concluded, is "dictated by *United States* v. *Place*."[1] *Ibid.*

Consistent with this Court's decisions in *Place* and *Jacobsen*, the courts of appeals have recognized that a canine sniff is not a search within the meaning of the Fourth Amendment. See, *e.g.*, *United States* v. *Rodriguez-Morales*, No. 90-1955 (1st Cir. Mar. 27, 1991), slip op. 16-19 (canine sniff of lawfully impounded vehicle); *United States* v. *Morales-Zamora*, 914 F.2d 200, 203-205 (10th Cir. 1990) (same); *United States* v. *Colyer*, 878 F.2d 469, 473-477 (D.C. Cir. 1989) (canine sniff of train sleeper compartment from public corridor); *United States* v. *DiCesare*, 765 F.2d 890, 897, amended, 777 F.2d 543 (9th Cir. 1985) (canine sniff of automobile trunk). Cf. *United States* v. *Whitehead*, 849 F.2d 849, 853-858 (4th Cir.) (canine sniff not a search, but police required to have reasonable suspicion before forcibly entering train sleeper compartment with dog), cert. denied, 488 U.S. 983 (1988). The court of appeals thus was correct in holding that a canine sniff of a garage from a public alley is not a search for Fourth Amendment purposes. As one court of appeals put it in a similar case, "when the odor of narcotics escapes from the interior of a vehicle, society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor." *Morales-Zamora*, 914 F.2d at 205.

2. Petitioner asserts that the decision in this case conflicts with the Second Circuit's decision in *United States* v.

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[1] There is no merit to petitioner's suggestion (Pet. 6-7) that *Place* and *Jacobsen* were undercut by *Arizona* v. *Hicks*, 480 U.S. 321, 324-325 (1987) (moving stereo equipment is a "search" within the meaning of the Fourth Amendment). In *Hicks*, the Court expressly noted that "a truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a 'search' for Fourth Amendment purposes." *Id.* at 328. A dog sniff from a public alley is such a cursory inspection.

Thomas, 757 F.2d 1359, cert. denied, 474 U.S. 819 (1985). Although *Thomas* took a different—and, in our view, incorrect—approach to the Fourth Amendment issue, the Second Circuit's approach would not lead to a different result in petitioner's case.

Thomas held that a canine sniff outside a defendant's apartment door is a Fourth Amendment search. 757 F.2d at 1365-1367. The court's opinion does not cite *Jacobsen*; it distinguishes *Place* on the ground that a defendant has a "heightened privacy interest * * * in his dwelling place." *Id.* at 1366; see also *id.* at 1367. In contrast, "[w]hile one generally has an expectation of privacy in the contents of personal luggage, this expectation is much diminished when the luggage is in the custody of an air carrier at a public airport." *Id.* at 1366.

In our view, the Second Circuit's analysis in *Thomas* is inconsistent with *Place* and *Jacobsen*, which turned on the absence of a protected right to possess contraband rather than on the location of the illegal drugs. In *Place*, this Court recognized that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." 462 U.S. at 707. The Court reasoned, however, that a canine sniff that reveals only the presence or absence of contraband does not impair that protected interest, because there is no right privately to possess illegal drugs. *Ibid.*; see also *Jacobsen*, 466 U.S. at 123-124. Since a person is no more entitled to possess illegal drugs in his house than in his luggage, there is no basis for the Second Circuit's constitutional distinction between houses and personal effects.[2]

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[2] As a practical matter, it may be more difficult for a trained dog to detect illegal narcotics inside a house than in a suitcase. And, of course, police entry onto private property for purposes of conducting the sniff may itself violate the Fourth Amendment. But where,

In any event, petitioner's argument fails even under *Thomas*. First, it is far from clear that the Second Circuit would extend the reasoning of *Thomas* from "dwelling places" to structures such as the isolated garage in this case. Moreover, the *Thomas* court did not suppress the evidence at issue in that case, but instead held that the defendant "must further show that there was not a sufficient residue of probable cause to support the [search] warrant, without considering the improper sniff, and that the agent who conducted the search did not reasonably rely on the warrant." 757 F.2d at 1367 (citing *United States* v. *Leon*, 468 U.S. 897 (1984)). The court concluded that

> [t]he DEA agent brought his evidence, including the positive "alert" from the canine, to a neutral and detached magistrate. That magistrate determined that probable cause to search existed, and issued a search warrant. There is nothing more the officer could have or should have done under these circumstances to be sure the search would be legal. The magistrate, whose duty it is to interpret the law, determined that the canine sniff could form the basis for probable cause; it was reasonable for the officer to rely on this determination. The *Leon* Court announced a "good faith" exception to the exclusionary rule, and we find that the exception applies [in] this case. Thus, the district court correctly refused to suppress the evidence seized at defendant['s] * * * apartment.

Id. at 1368.

In this case, the actual search leading to the seizure of drugs occurred pursuant to a warrant that was based not only on the canine sniff but also on a confidential inform-

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as here, the sniff is conducted from public property, the Fourth Amendment is not implicated.

ant's tip that the garage contained large amounts of cocaine. In addition, the police had observed petitioner over the course of several days furtively removing bags from the garage and delivering them to various locations.[3] Thus, *Leon* precludes suppression, because the search leading to the seized evidence was conducted in good faith pursuant to a judicial warrant.

Petitioner also is incorrect in contending (Pet. 5-6) that the decision in this case "conflicts in principle" with the decision of the Supreme Court of Colorado in *People* v. *Unruh*, 713 P.2d 370 (1986). The decision in *Unruh* rests on an adequate and independent state ground. See *id.* at 374, 377. In any event, the state court's analysis in *Unruh* would not lead to a different result in this case.

In *Unruh*, police recovered a locked safe that had been stolen from the defendant's basement. Following a canine sniff at the police station, it was determined that the safe contained illegal drugs. The court concluded that the dog sniff was a search because the defendant had no reason to expect that the contents of a basement safe "would be subject to a governmental investigative technique of any sort." *Id.* at 378. The court went on to hold that a dog sniff is constitutional if it is justified by reasonable suspicion, and that the sniff in that case was reasonable. In this case, in contrast, petitioner lacked a reasonable expectation that his illegal drugs would not "be subject to a governmental investigative technique of any sort," *ibid.*, because they were in fact detected by a trained dog from a public alley.

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[3] Although those observations were not mentioned in the affidavit, they are properly considered as part of the *Leon* good faith analysis. See, *e.g.*, *United States* v. *Edwards*, 798 F.2d 686, 690-692 (4th Cir. 1986).

Moreover, as discussed below, the canine sniff in this case, as in *Unruh*, was based on reasonable suspicion.[4]

3. Finally, the canine sniff in this case "could be justified * * * under *Terry* [v. *Ohio*, 392 U.S. 1 (1968),] upon [a] mere reasonable suspicion." *Place*, 462 U.S. at 723 (Blackmun, J., concurring). See also *Colyer*, 878 F.2d at 477-479 (dog sniff not a search, but if it were, it arguably would be a minimally intrusive one requiring only reasonable suspicion). Over a period of several days, the police observed petitioner getting bags out of the garage and delivering them to various locations. In addition, a confidential informant told the police that the garage contained large amounts of cocaine. In these circumstances, the officers' suspicion that petitioner was storing illegal drugs in the garage was reasonable, and justified the further investigative step of conducting a dog sniff from the adjacent public alley.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

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[4] In *People* v. *Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), also cited by petitioner (Pet. 6), the New York Court of Appeals expressly held that a canine sniff conducted outside the defendant's apartment was not a search within the meaning of the Fourth Amendment. 77 N.Y.2d at 24, 564 N.E.2d at 1056-1057, 563 N.Y.S.2d at 390-391.

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